

COMMENT

Exploring the Mens Rea Requirements of the Serious Crime Act 2007 Assisting and Encouraging Offences

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With the judgment in *R v Sadique and Hussain*,¹ the Court of Appeal can now be added to the chorus of academic voices lamenting the impenetrably complex drafting of Part 2 of the Serious Crime Act 2007² in general, and the *mens rea* provisions in particular.³ With this in mind, it is therefore understandable that despite the rather weak ground for appeal in *R v Sadique and Hussain*,⁴ the court took some considerable time working towards and setting out a simplified overview of the relevant offence.⁵ Such an enterprise is clearly in great need. After all, although the SCA's assisting and encouraging provisions may be 'the most convoluted . . . in decades',⁶ their extreme breadth of application, even in comparison to the other general inchoate offences with which they overlap considerably,⁷ will surely make them increasingly irresistible to prosecutors.

This comment does not seek to provide an overview of the Part 2 offences as a whole.⁸ Rather, its focus will be narrowed to arguably only the most complex and troublesome elements of the offences, those relating to *mens rea*. The advantage of this narrowed focus is that rather

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1 [2011] EWCA Crim 2872, [2012] 1 Cr App R 19.

2 Introducing the inchoate offences of encouraging or assisting a criminal offence. Section 59 of the Serious Crime Act 2007 (hereafter 'SCA') abolishes the common law offence of incitement.

3 See *R v Sadique and Hussain* [2011] EWCA Crim 2872, [2012] 1 Cr App R 19 at [33], Hooper LJ. For examples of academic comment, see J. Spencer and G. Virgo, 'Encouraging and Assisting Crime: Legislate in Haste, Repent at Leisure' [2008] *Archbold News* 7; D. Ormerod and R. Fortson, 'Serious Crime Act 2007: The Part 2 Offences' [2009] Crim LR 389; R. Fortson, *Blackstone's Guide to the Serious Crime Act 2007* (Oxford University Press: Oxford, 2008).

4 The principal ground of appeal contended that SCA, s. 46 was incompatible with Art. 7 of the European Convention on Human Rights.

5 See, in particular, *R v Sadique and Hussain* [2011] EWCA Crim 2872, [2012] 1 Cr App R 19 at [81]–[90].

6 Ormerod and Fortson, above n. 3 at 389.

7 For example, unlike attempt and conspiracy, to be liable for assisting and encouraging under the SCA, D need only be reckless as to the circumstances, consequences (s. 47(5)(b)(ii)) and *mens rea* (s. 47(5)(a)(ii)) of the future principal offence.

8 For work of this kind, see Ormerod and Fortson, above n. 3; Fortson, above n. 3.

than simply sketching a single interpretation of the *mens rea* requirements, any problems within that interpretation, as well as inconsistencies between the interpretations of others, may be exposed and discussed. Indeed, when looking at the guidance and analysis so far provided in both judicial and academic commentary, it is clear that significant problems have already arisen; problems relating to the vagaries of the statute itself as well as from a reliance on Law Commission discussion (based on prior Law Commission recommendation⁹), which is often inappropriate to the amended terms of the SCA.

To aid the analysis, the Part 2 offences will be separated and explored in two separate categories. The first, comprising the s. 45 and s. 46 offences, will focus on those offences that require D to assist or encourage P *believing* that P will commit a principal offence and that D's actions will have assisted or encouraged its commission. The second will focus on the s. 44 offence, where D must assist or encourage P *intending* that P will be assisted or encouraged to commit the principal offence. In each part, highlighting problems with the current analysis, the initial question will remain (mercifully) simple: if these offences are characterised by *belief* and *intention* respectively, what must D believe or intend to be liable for the offence? The answer, as will become clear, is very little indeed, with much of the *mens rea* for both categories of offence being satisfied by mere recklessness.

Following from this base observation, this comment then seeks to set out and summarise the minimum requirements of each offence. It is hoped that such an analysis will aid future courts, as was attempted in *R v Sadique and Hussain*.¹⁰ Beyond this, the narrow focus on *mens rea* will also allow progress beyond interpretation to a further layer of analysis, highlighting and pre-empting a number of concerns that emerge from the identified *mens rea* requirements.

Sections 45 and 46: belief offences?

Starting with the terms of the SCA alone, ss 45 and 46 state (apparently) clearly that *belief* is required both in relation to D's own conduct (D must believe that his 'act will assist or encourage [the] commission' of the principal offence¹¹), and that *belief* is also required by D in relation to the future *actus reus* and *mens rea* of P (D must believe that the principal 'offence will be committed'¹²). However, as is widely appreciated, the apparent requirement for D to *believe* that P will complete the principal offence must be read in conjunction with s. 47, and s. 47(5) in particular. Here, rather than a strict requirement of belief, it is stated that (for the two offences) D will be liable where he is merely *reckless* as to the circumstance and consequence elements of P's principal offence, as well as P's *mens rea* for that offence.

⁹ Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, Law Com. Report No. 300 (2006).

¹⁰ [2011] EWCA Crim 2872, [2012] 1 Cr App R 19 at [87].

¹¹ SCA, s. 45(1)(b)(ii) and s. 46(1)(b)(ii).

¹² SCA, s. 45(1)(b)(i) and s. 46(1)(b)(i).

Comparing these two sets of statements, of course, reveals an apparent contradiction. This is because, if the Part 2 offences require D to *believe* that the principal offence will be completed (as per ss 45 and 46), then *recklessness* should not be enough to satisfy D's *mens rea* in relation to any part of that offence. However, if *recklessness* is all that is required of D in relation to the circumstance and consequence elements of the principal offence, as well as the *mens rea* of P (as per s. 47(5)), then it does not make sense (and is misleading) to say that D must *believe* that the principal offence will be completed.

Moving to the Court of Appeal's appraisal, it is therefore interesting that despite seeming to recognise both sides of the apparent contradiction, the court in *R v Sadique and Hussain* does not seek a resolution. Instead, when discussing s. 47, the court rather cryptically places belief and recklessness alongside each other as if they were interchangeable.

At risk of over-simplification, it can be stated that the section 46 offence requires proof of 'full' *mens rea* on the part of D in relation to the offence which he *believed* would be committed, nothing less than subjective *recklessness* will do.¹³

One may excuse the court in *R v Sadique and Hussain* on the ground that recklessness as to elements of the principal offence was not required in that case to find liability. However, reference to recklessness is also absent from the court's final outline of *mens rea*: an outline that is intended to aid future courts to apply the Part 2 offences.¹⁴ In fact, if this summary were to be applied generally, requiring D to believe that the principal offence will be completed by P, it would effectively make the terms of s. 47 redundant.

The answer to the apparent contradiction lies not with a choice between the two sides, however, but through a reinterpretation of what is meant by D believing the *offence* will be committed. This is because, despite the general language of ss 45 and 46, common provisions in s. 47(3) and (4) state that in order to demonstrate that D *believes* the principal offence will be committed:

it is sufficient to prove that he believed . . . that an act would be done which would amount to the commission of that offence.

Therefore, contrary to the conclusion in *R v Sadique and Hussain* (and that implied by ss 45 and 46 alone) that D must believe that P will complete every element of the principal offence, it is sufficient that D should only believe that P will complete the act element, with recklessness being sufficient in relation to the other offence elements and requisite *mens rea* (as per s. 47(5)). For example, if D lends P a jemmy to prise open a door, it is likely that D will believe that this is what P will do. If D also believes that the door/property being opened will not belong to P, and that P will steal from the property once inside, it is clear that D will be liable for an offence under s. 45 of assisting burglary. What this latest observation adds, however, is that even if D did not believe that the

¹³ *R v Sadique and Hussain* [2011] EWCA Crim 2872, [2012] 1 Cr App R 19 at [65] (emphasis supplied).

¹⁴ *Ibid.* at [87].

property belonged to another, and did not believe that P would steal from it, his belief as to the use of the jemmy (to open a door), combined with recklessness as to these other elements, would still be enough to satisfy s. 45.

Although the apparent contradiction can be thus resolved, it still leaves language within ss 45 and 46 that is highly misleading, and has (it seems) already misled the court in *R v Sadique and Hussain* in its attempts to summarise the law. This warrants brief comment. It is by now well established that within criminal attempts, although s. 1 of the Criminal Attempts Act 1981 requires D to act with 'intent to commit an offence', this *intent* need not relate to every element of the principal offence, with fault as to circumstance elements allowed to reflect/track the *mens rea* of the principal offence.¹⁵ However, the idea that D can be said to *intend* an offence when reckless as to circumstances has always (and still does) exist within a controversial and criticised fiction. For example, if D intends to damage property unsure whether it belongs to him (circumstance), it seems illogical to say he *intends to damage another's property*, especially if the property in fact does belong to him.¹⁶ In light of this, it is therefore particularly regrettable that the SCA should also employ language of intending or believing *the offence*, only to qualify this (in a later supplementary section) with recklessness, this time not only to potential circumstances, but also consequences and the *mens rea* of P. The result is even greater straining of the legal fiction. For example, if D lends P a jemmy (as above) in the belief that P will use it to open a door, but only foreseeing a risk that this might be in the context of a burglary, or if D encourages P to drive home unsure whether P would be over the alcohol limit, the idea that D *believes* that P will commit burglary and *believes* that P will drive over the prescribed limit is very difficult to accept. However, when applying the SCA, this is the approach that must be employed. The language of the statute is likely to mislead courts (as we have seen), confuse juries and where D does act with mere recklessness it will also mislabel his conduct. That all this has been achieved by a revision to the Law Commission's original draft Bill, a Bill that clearly stated a requirement of belief only for the criminal *acts* of P, makes this latest fiction even more indefensible.¹⁷

A further problem in this area highlighted by *R v Sadique and Hussain*, relating to ss 45 and 46 in particular, is the use of prior Law Commission material to interpret specific provisions of the legislation.¹⁸ Although the SCA is broadly based upon the Law Commission's recommendations, significant changes made by the government mean that such reliance has the potential to lead to error. For example, independently of the

15 This was first recognised in *R v Khan* [1990] 1 WLR 813.

16 For discussion of this point in relation to criminal attempts see, R. Buxton, 'Circumstances, Consequences and Attempted Rape' [1984] Crim LR 25; cf. G. Williams, 'The Problem of Reckless Attempts' [1983] Crim LR 365. For a more recent discussion of this issue in relation to the range of general inchoate offences, see J. J. Child and A. Hunt, 'Mens Rea and the General Inchoate Offences: Another New Culpability Framework' *Northern Ireland Legal Quarterly* (2012) (forthcoming).

17 Law Commission, above n. 9 (cl. 2 of the appended draft Bill).

18 *Ibid.*

confusion discussed above, the court in *R v Sadique and Hussain* makes particular use of the Law Commission report when discussing the differences between a s. 45 and s. 46 offence.

To take an example. D gives P a gun. Giving P a gun is . . . capable of encouraging or assisting the commission of offences X, Y and Z . . . If it may be that D, at the time of giving the gun, believes that one or more offences X, Y and Z will be committed but has no belief as to which will be committed, section 46 should be used. The Law Commission Report reveals that section 46 is thought to be necessary because of a belief that if, in these circumstances, D is charged with three section 45 offences, one in relation to X, one in relation to Y and one in relation to Z, D would have to be acquitted of each section [45¹⁹] offence if he believed that one of the three offences, X, Y and Z, would be committed but he did not know which one.²⁰

Although the Court of Appeal is clearly unhappy with this example, commenting that ‘if this is right, then we feel that the result could have been obtained in an easier manner’,²¹ it nevertheless continues under the assumption that it is correct, and the issue becomes how this affects the presentation of an indictment. The problem, of course, is that this is *not* correct. As an example to illustrate the Law Commission’s recommended policy, it is very useful. The Law Commission recommends that for D to commit (the equivalent of) a s. 45 offence, he must *believe* that P will complete *every element* of the principal offence. Therefore, if D believed an offence would be committed X, Y or Z, but did not know which one, it is clear that he lacks the required belief in relation to any of the offences individually: D believes that one will be committed, but does not know (is reckless) as to which.²² However, as discussed above, the effect of the government’s change in s. 47(5) is that, contrary to the Law Commission’s recommendations, D need only believe that the act element of P’s offence will be completed, with recklessness sufficing for the other elements. Therefore, for example, if D believed that P would commit an offence by shooting the gun (act) in a way that caused either criminal damage, grievous bodily harm or murder, but did not know which, it would be entirely possible to charge D with separate s. 45 offences: D believes that P will complete the act element of each principal offence, and is reckless as to the other elements and fault.²³

Summarising the *mens rea* requirements of the s. 45 and s. 46 offences, the Court of Appeal states that:

D can only be convicted of the first count (offence X) if:

a. Either:

(i) D believes that X will be committed [s. 45]; or

19 Although the judgment refers to s. 46 at this point, it can be assumed that this is the result of a typing error.

20 *R v Sadique and Hussain* [2011] EWCA Crim 2872, [2012] 1 Cr App R 19 at [40].

21 *Ibid.* at [41] (my emphasis).

22 Law Commission, above n. 9 at paras 5.90–5.94.

23 As will be discussed below, where s. 46 still provides assistance is where the offences contemplated by D have different act elements.

- (ii) D believes that one or more of the offences specified in the indictment (X, Y and Z) will be committed but has no belief as to which [s. 46]; and
- b. D believes that his act will encourage or assist the commission of X; and
- c. D believes that X will be committed with the necessary fault for X.²⁴

In light of the discussion above, however, the minimum requirements of the s. 45 and s. 46 offences are more accurately stated as:

- D can only be convicted of the first count (offence X) if:
 - a. D believes that his act will encourage or assist the commission of (the act element of) X; and
 - b. Either:
 - (i) D believes that the *act element* of X will be committed [s. 45]; or
 - (ii) D believes that one or more *acts* of the offences specified in the indictment (X, Y and Z) will be committed but has no belief as to which [s. 46]; and
 - c. D is *reckless* as to whether, if the act element is completed, it will be completed with the necessary circumstance elements of X; and
 - d. D is *reckless* as to whether, if the act element is completed, it will be completed with the necessary consequence elements of X; and
 - e. D is *reckless* as to whether, if the act element is completed, it will be completed with the necessary fault for X. Or, where D holds the required fault for X.²⁵

The differences recognised in the second summary are important for two principal reasons. First relating to the true breadth of the offences summarised and, second, because of the potential for future uncertainty that becomes evident.

When discussing the breadth of the s. 45 offence above, it was highlighted that where D assists or encourages multiple offences that share the same act element, requiring mere recklessness as to the other elements of the principal offence allows for considerable overlap with s. 46 liability. However, the increased breadth of these offences (recognised in the amended summary) goes well beyond an increased overlap in relation to *Maxwell*²⁶ type cases. For example, imagine that D provides P with a gun, believing that P will shoot the gun (act), but unsure as to whether P will do so in contravention of one of a number of offences *or potentially do so innocently*. In this scenario, application of the Court of Appeal's summary above would find no liability for either offence: although D believes that the act element of the principal offence will be completed, he does not believe that the other elements of a crime will

²⁴ *R v Sadique and Hussain* [2011] EWCA Crim 2872, [2012] 1 Cr App R 19 at [87].

²⁵ This final possibility in relation to the fault required for the principal offence is important to the outline of minimum requirements suggested here because it allows for liability even where D does not believe that (and is not even reckless as to whether) P will act with the required fault (s. 47(5)(iii)). For discussion, see Ormerod and Fortson, above n. 3 at 407.

²⁶ *DPP for Northern Ireland v Maxwell* [1978] 1 WLR 1350. In this case, D was found liable for aiding and abetting the doing of an act with the intent to cause an explosion. D was liable despite not knowing which of a number of anticipated offences P was going to perform.

(not might) also be completed. However, if the amended summary above is applied, it is clear that D does satisfy the *mens rea* of the s. 45 offence: he believes that the act element will be completed, and is reckless as to the completion of the other elements and fault. This interpretation of the s. 46 offence then widens potential liability even further. Requiring the same *mens rea* as above in relation to the circumstances, consequences and fault of the principal offence, s. 46 goes further by allowing for liability even where D does not know which of a number of possible *act elements* will be completed by P. Thus, as long as D believes that P will complete one of a number of acts, each of which D thinks *may* be part of a particular criminal action, D will not escape liability even where he thinks those actions may alternatively be done innocently.

The second reason for highlighting the differences between the summaries above relates to important questions within the law that are hidden in the first summary. Particularly, having identified the different standards of *mens rea* required in relation to the act element of the principal offence compared to the other elements, it becomes apparent (as it does not from the first summary) that a reliable definition of the act element is required in order to identify it for this separate treatment. Returning to an earlier example, imagine that D lends P a jemmy believing that P will use the jemmy to open a door, but reckless as to whether it will be his own door or the door of another in the context of a burglary. If the act element of the offence is interpreted (as it was above) as the 'opening of a door' with the ownership of the door/property as a circumstance, then D will have the *mens rea* required for the s. 45 offence: belief as to the act and recklessness as to the other elements and fault. However, if the act element is interpreted as the 'opening of another's door', then D does not act with this belief and will avoid liability. Without an objective definition to separate the act element, this problem will arise when applying the Part 2 offences to almost all criminal offences.

Indeed, the potential problems caused by the absence of clear and objective definitions can already be identified within early academic commentary. For example, within *Smith and Hogan's Criminal Law* when discussing potential liability for assisting and encouraging murder under s. 45, Ormerod states that 'in the example with the supply of the gun [and assisting murder], D must believe that P will use the gun to cause death'.²⁷ However, for this to be right, it must therefore be that P's *act* includes within its definition the causing of death. But for most, including Ormerod just a few lines later, death is rather seen as part of the *consequence* element of murder. As above, this is not simply a trivial question of categorisation. If D assists or encourages P merely reckless as to whether P goes on to cause death, then whether 'death' is considered part of the act element (requiring belief) or the consequence element

27 D. Ormerod, *Smith and Hogan's Criminal Law*, 13th edn (Oxford University Press: Oxford, 2011) 475.

(satisfied by recklessness) or even overlapping both (requiring *presumably* belief) becomes central to his potential liability for an offence (assisting and encouraging murder) that carries a maximum sentence of life imprisonment. Attempting to provide a workable definition of the act element is a task that has exercised the minds of criminal academics in a theoretical sense for many years.²⁸ However, with the SCA explicitly structured in a manner that requires such identification in every case, the lack of a definition means that this type of dispute and uncertainty will now have serious practical implications.

Section 44: intention offence?

Beginning with the text of s. 44, it is interesting to note that although the offence clearly requires D to *intend* that his own actions should assist or encourage P ('intends to encourage or assist its commission'²⁹), unlike the s. 45 and s. 46 offences, it is silent as to D's *mens rea* in relation to the completion of the principal offence by P.

The fact that D's *mens rea* as to the principal offence is not set out in s. 44 does not, of course, mean that the offence does not require *mens rea* of this type. As discussed above, the minimum requirement that D should be reckless in relation to the circumstances, consequences and fault³⁰ of the principal offence (s. 47(5)) applies to s. 44 liability exactly as it did to the other Part 2 offences. In fact, although it is necessary again to look to s. 47 to understand the s. 44 offence, the lack of detail in s. 44 at least avoids the apparent contradiction so unhelpful to understanding ss 45 and 46. Therefore, if D intentionally encourages P to drive for example, reckless as to whether P is over the prescribed alcohol limit (circumstance), D will be caught by the s. 44 offence. However, if D did not foresee the risk that P would be over the limit, he will avoid liability.

Although apparent conflict with s. 47 is avoided, the lack of detail in s. 44 relating to D's fault as to P's future offence has the potential to create new problems. This is particularly clear with regard to the *mens rea* required of D as to P's future *act* element.³¹ Within the Law Commission's recommendations and draft Bill, it is clearly stated that for D to commit (the equivalent of) the s. 44 offence, he must *intend* for P to complete the act element.³² However, the lack of an equivalent provision in the SCA has already led to uncertainty. Ormerod, for example,

28 For some more recent work in this area, see M. S. Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (Oxford University Press: Oxford, 1993); P. Robinson, *Structure and Function in Criminal Law* (Oxford University Press: Oxford, 1997).

29 SCA, s. 44(1)(b).

30 'Fault' is again subject to the special provision allowing liability where D is not reckless as to the fault of P, but does have the requisite *mens rea* for the principal offence himself (SCA, s. 47(5)(iii)).

31 For the s. 45 and s. 46 offences, it will be remembered, D's required fault in relation to the act element of P's principal offence is gleaned from the terms of s. 45 and s. 46 themselves.

32 See Law Commission, above n. 9 at paras 5.86–5.89 and cl. 1(3)(a). See also R. Sullivan, 'Inchoate Liability for Assisting and Encouraging Crime—the Law Commission Report' [2006] Crim LR 1047 at 1050.

has clearly proceeded under the assumption that an intention to assist or encourage P's act element (s. 47(2)) implies that D must also intend that that act element be completed.³³ However, as the Law Commission highlighted in its Report, this conclusion is by no means self-evident, drawing attention to disagreement on the issue in the Canadian courts.³⁴ Confirming this point, it is noted that Fortson has taken a different line to Ormerod and interpreted the SCA to require (for each of the three Part 2 offences) 'that D *believed* that an act would be done [by P] "which would amount to the commission of that offence"'.³⁵

Whilst recognising both options of intention or belief as to P's future *acts*, a further option that has not yet been considered in the literature is one based on recklessness. Although, as Ormerod rightly points out, where D intends to assist or encourage P's acts it will be unusual that he does not also intend (or at least believe) that they will be completed. However, such cases are not unimaginable. For example, take a scenario in which P is complaining to a friend D about a third party (V) that has wronged him in some way, and repeatedly telling D that he is going to punch V for what he has done. Where such hollow threats have been common in the past, it may well be that D's intentional encouragement of P to go through with his threat is simply an attempt to cut the conversation short. D may know that P is very unlikely to carry out the threats and certainly not want him to do so. D intends to encourage P's act, but he is merely reckless as to its completion.

Having recognised recklessness as to P's future acts as theoretically consistent with an intention to encourage them, a number of reasons emerge why this interpretation of s. 44's minimum requirements may be preferred. First, if intention or belief were desired by drafters of the statute, then it is strange they are not explicitly set out in a manner reflecting the equivalent drafting of the s. 45 and s. 46 offences.³⁶ Secondly, it could be contended that the language of s. 47(5) in particular implies a recklessness standard. For example, setting out the fault requirements in relation to the other elements of the principal offence, this is done in the context of an act element '*if done*' and '*were the act to be done*', terminology that seems (in the absence of contrary provisions³⁷) to imply risk rather than belief or intention. Finally, a requirement of recklessness would also be consistent with D's *mens rea* for the rest of the principal offence, and in line with the general presumption of *mens rea* where a statute is non-specific.³⁸

With this discussion in mind, the minimum *mens rea* requirements of the s. 44 offence can now be summarised as:

D can only be convicted of assisting or encouraging offence X if:

33 See Ormerod, above n. 27 at 474, where it is stated that 'unlike s 44, [for s. 45 and s. 46] D need not *intend* that the criminal act by P should be done'.

34 Law Commission, above n. 9 at paras 5.73–5.77.

35 Fortson, above n. 3 at para. 6.100 (my emphasis).

36 SCA, s. 45(b) and s. 46(1)(b).

37 For s. 45 and s. 46 offences, of course, s. 47(3)(a) and (4)(a) make it clear that a belief standard is required.

38 *R v G* [2008] UKHL 37, [2009] 1 AC 92.

- a. D intends that his act will encourage or assist the commission (of the act element) of X; and
- b. D is *reckless* as to whether the act element of X will be completed; and
- c. D is *reckless* as to whether, if the act element is completed, it will be completed with the necessary circumstance elements of X; and
- d. D is *reckless* as to whether, if the act element is completed, it will be completed with the necessary consequence elements of X; and
- e. D is *reckless* as to whether, if the act element is completed, it will be completed with the necessary fault for X. Or, where D holds the required fault for X.³⁹

As before, having set out a summary of the *mens rea* requirements, it is useful to reflect briefly on their implications. The first point to be noted, perhaps even more than in the context of the s. 45 and s. 46 offences above, is the extent to which recklessness dominates D's *mens rea* requirements. Going well beyond its original Law Commission equivalent that required intention and belief that the elements of the principal offence would be completed,⁴⁰ D will be liable under the s. 44 offence whenever he intends to assist or encourage the act element of an offence even if he is merely reckless as to whether any part of that offence will actually come about. For example, if D intentionally encourages P to drive (act), reckless as to whether P is over the prescribed alcohol limit, and even reckless as to whether P will in fact drive,⁴¹ he will be caught by the s. 44 offence.⁴² It is interesting to note that the Court of Appeal in *R v Blackshaw*⁴³ makes repeated reference to the fact that the acts of encouragement it was dealing with (using social media sites to encourage rioting) were 'no joke'⁴⁴ and that D 'believed that the offences he was inciting would happen'.⁴⁵ Although such language is best read in line with the court's focus on sentencing, it is nevertheless interesting that D could still be liable for a s. 44 offence even if his encouragement *was* a joke. For example, if D posted messages on *public* social media encouraging others to riot, then it would be hard for him to claim that he did not intend to encourage. That D may have been joking, that he did not intend or believe that the offences (rioting) would actually happen, would make no difference to his liability so long as he was at least

39 This final possibility in relation the fault required for the principal offence is important to the outline of minimum requirements set out here because it allows for liability even where D does not intend that (and is not even reckless as to whether) P will act with the required fault (SCA, s. 47(5)(iii)). For discussion, see Ormerod and Fortson, above n. 3 at 407.

40 Law Commission, above n. 9 at cl. 1 of the draft Bill.

41 The assumption here is that the interpretation of s. 44 (above) is correct, requiring D to be merely reckless as to whether the act element of the principal offence will be completed. However, even if belief or intention were required (as per Ormerod and Fortson respectively), recklessness as to the other elements of the principal offence still provide for extremely wide liability.

42 With such a wide offence, the important role played by the (rather vague) s. 50 defence of 'acting reasonably' will be increased further.

43 *R v Blackshaw* [2011] EWCA Crim 2312, [2012] Crim LR 57.

44 *Ibid.* at [53] and [57].

45 *Ibid.* at [57].

reckless. Such a conviction would not, of course, be possible under any of the other general inchoate offences.

The other issue that is interesting to touch briefly upon in relation to the summary above is that of double or infinite inchoate liability (for example, where D is liable for assisting or encouraging a conspiracy to commit a principal offence). As has been widely appreciated,⁴⁶ as well as creating the new assisting and encouraging offences, Part 2 of the SCA has also dramatically increased the availability (and therefore likelihood) of such liability. However, although commentators have rightly drawn attention to this shift, they have tended to play down its significance in terms of a potential to give rise to over- (or inappropriate) criminalisation on the basis that double inchoate liability is limited to the s. 44 *intention* offence rather than the supposedly broader s. 45 and s. 46 offences. However, as before, it is important to recognise that although the Law Commission's equivalent to the s. 44 offence remained relatively narrow (and therefore provided the check the Law Commission felt necessary to broaden double inchoate liability⁴⁷), this is not true of the s. 44 offence as enacted. For example, the Law Commission uses the example of D who makes a room available (assists) two others so that they can make a plan (conspire) to murder V. For the Law Commission, D is rightly liable for assisting a conspiracy to murder because he is intending to assist and 'intending they should commit the offence of conspiracy to murder'.⁴⁸ The Law Commission then contrasts this with D who does not so intend, but merely believes the conspiracy will be formed. The Law Commission's view is that D should not be liable in such a situation.⁴⁹ Going beyond both of these possibilities however, s. 44 now creates the potential for double inchoate liability even where D intentionally assists or encourages P, reckless as to whether P will complete the *actus reus* of that offence (in this case, to form an agreement), and reckless as to P's fault in relation to the potential principal offence to follow (in this case, P's intention to commit murder). Again, this clearly highlights another area likely to cause significant problems for courts in the future.⁵⁰

Conclusion

Several writers, including myself, have been critical of the offences in Part 2 of the SCA.⁵¹ The purpose of the foregoing discussion, however,

46 See, e.g., Ormerod and Fortson, above n. 3 at 409; Fortson, above n. 3 at paras 6.77–6.95.

47 Law Commission, above n. 9 at Part 7.

48 Ibid. at para. 7.20.

49 Ibid.

50 As above, even if Ormerod's contention that intending to assist or encourage an act element implies a requirement to intend the completion of that act is accepted, it is still contended that intention in relation to the act alone would provide insufficient protection from the potential for inappropriate criminalisation.

51 Such criticisms have not only focused on the potential over-inclusiveness of the Part 2 offences, but also their potential under-inclusiveness. See, e.g., Spencer and Virgo, above n. 3; and, to a lesser extent, Ormerod and Fortson, above n. 3. For a discussion of potential under-inclusiveness, see the later discussion of inchoate procurement in J. J. Child, 'The Differences Between Attempted Complicity and

has been to address and discuss the logically prior question as to what the minimum *mens rea* requirements of the offences actually are. It emerges from that inquiry that the vast majority of the *mens rea* requirements for both offences do not require belief or intention, but rather are satisfied by mere recklessness. It is not correct, therefore, to refer to these offences, and to distinguish them from one another as categories of offences requiring either belief, on the one hand, or intention on the other. It is surely more accurate to regard these offences as being risk based: criminalising D for believing or intending to create the risk that a future offence will be committed. Whether the existence of offences which impose liability in such situations is acceptable is a matter which has not been expressly addressed here. However, it is hoped that the analysis set out above will serve to provide a legally accurate account of what the minimum *mens rea* requirements of the offences are. This is sought so as to provide a sounder basis for application in the courts, as well as a sounder basis for writers proceeding to debate the appropriateness of these offences.